

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

MARK ABERNATHY, Appellant,)	
)	
v.)	DOCKET NUMBER
)	DC-1221-14-0364-W-1
DEPARTMENT OF ARMY, Agency.)	
)	

**BRIEF ON BEHALF OF THE UNITED STATES OFFICE OF SPECIAL COUNSEL
AS AMICUS CURIAE**

IDENTITY OF THE AMICUS CURIAE

Amicus curiae, the United States Office of Special Counsel (OSC), is an independent federal agency charged with protecting federal employees, former federal employees, and applicants for federal employment from “prohibited personnel practices,” as defined in 5 U.S.C. § 2302(b) of the Whistleblower Protect Act of 1989 (WPA), as amended by the Whistleblower Protection Enhancement Act of 2012 (WPEA). In particular, OSC protects individuals who suffer personnel actions by federal agencies in retaliation for disclosing “any information” that they reasonably believe evidences a violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety, unless such disclosure is specifically prohibited by law. See 5 U.S.C. § 2302(b)(8).

The Merit Systems Protection Board (MSPB or Board) invited amicus curiae briefs in connection with the above-captioned matter. See Notice, 81 Fed. Reg. 2913 (Jan. 19, 2016). The MSPB set a filing deadline of February 9, 2016. As the agency charged with investigating and

prosecuting violations of the WPA, OSC welcomes the opportunity to offer its views to the Board on the legal issue raised in this case.

STATEMENT OF THE ISSUE

Whether a whistleblower must be a federal employee or applicant for employment at the time he makes his disclosures to be protected by the WPA.

INTRODUCTION AND SUMMARY

On January 23, 2015, an MSPB Administrative Judge (AJ) dismissed the appellant's individual right of action (IRA) appeal, concluding that the Board lacked jurisdiction since "he was not 'an employee, former employee, or applicant for employment' at the time he made his disclosure, but rather, he was a federal contractor." Abernathy v. Dep't of Army, 2015 WL 304961 (M.S.P.B. 2015). The appellant filed a petition for review of this decision on March 18, 2015.

OSC respectfully submits that the AJ erred. The key holding in the AJ's decision—that a whistleblower must be a federal employee or applicant at the time of the disclosure—is legally flawed and undermines the public policy embodied in the WPA. Specifically, the AJ's ruling contradicts established Board precedent, is not mandated by the statutory text, runs counter to the WPA's purpose and legislative intent, and, if upheld, would weaken whistleblower protections. For these reasons, we ask the Board to reverse the AJ's legal ruling and remand the appellant's case for a hearing on the merits.

STATEMENT OF FACTS¹

In August 2012, the appellant worked as a contract employee for the Department of the Army in Germany. That month, he disclosed to the Europe Regional Medical Command (ERMC) Office of the Inspector General what he believed to be "an illegal act governed by and

¹ All of the facts included in this section were taken from the appellant's IRA appeal filings.

contrary to Federal Acquisition Regulations.” Specifically, the appellant explained that the ERMC Telehealth Program had allocated \$99,000 in unfunded money to procure video-conference equipment for behavioral health screening of soldiers returning from Iraq and Afghanistan. He stated that the Army believed the equipment could be given to Primary Care Providers at the Landstuhl Medical Center in an effort to increase their monthly Telehealth Program production statistics. But the appellant argued that, because ERMC had purchased the equipment with congressionally-appropriated Overseas Contingency Operations money, it would be illegal to use it for this purpose.

A few weeks after making his disclosure, three contract employee positions within the Telehealth Program, including the appellant’s, were announced as federal jobs. The appellant, who had been performing the duties of the position, applied to become a federal employee. However, the Army’s selecting official, who had endorsed alternative use of the video-conference equipment, told the appellant that he would not be selected “because he had become too confrontational.” Soon after, the appellant learned that his name had not been referred for consideration. The other two contract employees, by contrast, were hired for their now-federal jobs. The appellant alleges that the Army did not select him in retaliation for his disclosure.

ARGUMENT

The MSPB has IRA jurisdiction over whistleblower retaliation claims filed pursuant to 5 U.S.C. § 1221(a) of the WPA. The WPA’s primary provision on whistleblower retaliation—section 2302(b)(8)—states in relevant part:

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—

(A) *any* disclosure of information *by an employee or applicant* which *the employee or applicant* reasonably believes evidences—

(i) any violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. (emphasis added)

In this case, the Board suggests that the presence of the phrase “employee or applicant” in section 2302(b)(8)(A) may create ambiguity about whether the timing of the disclosure is significant. Specifically, the MSPB questions whether “both the disclosure and the subject matter of the disclosure must have occurred after the individual who is seeking corrective action in an IRA appeal became an applicant or employee.” Notice, 81 Fed. Reg. 2913 (Jan. 19, 2016).

I. The MSPB Should Adhere to Its Established Precedent That the WPA Prohibits Retaliation Against Whistleblowers Who Were Not Yet Applicants or Employees at the Time They Made Disclosures.

A. Under Board Precedent, Whistleblowers May Appeal Retaliatory Acts Taken Against Them as Applicants or Employees.

The Board already has resolved this specific legal issue. The first case to do so, Greenup v. Department of Agriculture, 106 M.S.P.R. 202 (2007), involved a fact pattern very similar to this case. Though Greenup was a county employee at the time of her disclosures, the MSPB held that she could bring an IRA appeal challenging her subsequent non-selection for a federal job. See 106 M.S.P.R. at ¶ 6. On the precise issue presented here, the Board concluded that the WPA “does not specify that a disclosure must have been made when the individual seeking protection was either an employee or an applicant for employment.” Id. at ¶ 8. To hold otherwise would protect first-time federal applicants only when they make disclosures in the short time that the

application is pending. The Board concluded that Congress did not intend to grant such a limited right of review. Id.

Three years later, the Board considered the same legal issue in Weed v. Social Security Administration, 113 M.S.P.R. 221 (2010). In that case, it revisited and confirmed its analysis in Greenup, and offered an even more definitive ruling: “Further, contrary to the agency’s argument, a whistleblower does not need to be an employee, an applicant for employment, or a former employee at the time he made his protected disclosures.” 113 M.S.P.R. at 227.

Finally, just last year, the Board considered a petition for review from a whistleblower who made a disclosure before he became a federal employee or applicant. In Cahill v. Department of Health & Human Services, 2015 WL 1477814 (M.S.P.B. 2015), the MSPB concluded that the petitioner could not prevail on his claim because he was a contract employee *when the alleged retaliation occurred*, and thus was not subjected to a “personnel action” under section 2302(a). Id. at ¶ 6 (emphasis added). Notably, the Board did not express any doubt about whether the disclosure he made while he was a contract employee was protected under section 2302(b)(8). In fact, it conceded the petitioner’s contention on that point, but noted that “this fact is immaterial” because the alleged personnel action—a reduction in pay—was taken by the contractor, not the agency, and occurred before the petitioner was a federal employee or applicant. Id. at ¶ 10. The Board thus continues to relate IRA jurisdiction with the timing of the alleged personnel action, rather than the timing or content of the whistleblower’s disclosure.²

² Significantly, the Board’s IRA appeal form itself asks appellants to identify their “Federal employment status *at the time of the decision or action you are appealing*” (emphasis added). This question correctly seeks to determine whether an appellant was a federal employee or applicant when the retaliation occurred, not when the disclosure was made.

Because the MSPB has already resolved this issue—and nothing in the relevant law or public policy has constricted the WPA’s scope in the interim—the AJ here erred in refusing to follow the Board’s well-established precedent.³

B. Non-Precedential Federal Circuit Cases Can Be Distinguished and Are Not Binding on the Board.

In its January 2016 notice, the Board cited three non-precedential Federal Circuit decisions that contain language concerning the timing of a whistleblower’s disclosure. See Nasuti v. Merit Sys. Prot. Bd., 376 F. App’x 29 (Fed. Cir. 2010); Guzman v. Office of Pers. Mgmt., 53 F. App’x 927 (Fed. Cir. 2002); Amarille v. Office of Pers. Mgmt., 28 F. App’x 931 (Fed. Cir. 2001). These rulings are all distinguishable. The court in each of these cases was primarily concerned with analyzing the scope of whistleblower protections for former employees. Section 2302(b)(8) does not explicitly list “former employees” among the categories of individuals protected from whistleblower retaliation. This caused the Federal Circuit to question whether and to what extent they are covered under the WPA.⁴

But section 2302(b)(8) *does* explicitly prohibit whistleblower retaliation against “applicants”—the appellant’s status at the time of the retaliation in this case. The Federal Circuit decisions cited by the Board thus address an entirely different question. Further, these cases predate the WPEA, which (as discussed below) discouraged judicially-created obstacles to

³ Indeed, Board law has long held that the WPA even protects non-whistleblowers—i.e., perceived whistleblowers and third parties associated with whistleblowers. See Special Counsel v. Dep’t of the Navy, 46 M.S.P.R. 274 (1990); Duda v. Dep’t of Veterans Affairs, 51 M.S.P.R. 444 (1991). In each case, the Board found that a liberal construction of the statute (1) strengthens and improves protection for federal employees or applicants; (2) prevents retaliation; and (3) helps to eliminate wrongdoing in the federal government. See Whistleblower Protection Act of 1989, Pub. L. 101-12, Sec. 2. Surely, since the MSPB in Special Counsel v. Navy and Duda interpreted the WPA to protect even those who made no actual disclosures at all, it should read the statute to prohibit retaliation against actual applicants—like the appellant—who have made disclosures.

⁴ OSC offers no opinion here as to the circumstances under which the WPA might protect former employees from whistleblower retaliation that occurs after they leave the federal workforce.

whistleblower protection claims. Accordingly, the Federal Circuit rulings raised by the Board should have no bearing on the proper resolution of the appellant's case.

II. The Text, Purpose, and Legislative History of the WPA Favor Protecting Whistleblowers Who Make Disclosures Before Applying for Federal Employment.

Remedial statutes, like the WPA, should be interpreted broadly where such a reading is possible. See, e.g., Pasley v. Dep't of Treasury, 109 M.S.P.R. 105, ¶ 12 (2008); Fishbein v. Dep't of Health & Human Servs., 102 M.S.P.R. 4, ¶ 8 (2006) (because the WPA is remedial legislation, the Board will construe its provisions liberally to embrace all cases fairly within its scope, so as to effectuate the purpose of the Act). A remedial statute riddled with exceptions and loopholes may chill current and potential whistleblowers from coming forward because they worry that the law's unclear scope might leave them unprotected. Accordingly, the MSPB should read the WPA to prohibit personnel actions taken by federal agencies against whistleblowers, regardless of when the affected federal employee or applicant made the disclosures at issue.

A. The WPA's Statutory Text Supports a Reading That an Applicant Need Not Hold That Status at the Time of His or Her Disclosure.

Here, the plain language of section 2302(b)(8)(A) fully supports reading the WPA broadly to preclude retaliation against those who make disclosures before applying for federal employment. Specifically, the use of the phrase "employee or applicant" in section 2302(b)(8)(A), when read in appropriate statutory context, does not link protection of a disclosure to an individual's status as an applicant or employee. See Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined in reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."). Indeed, this same section also emphasizes that "*any* disclosure of information" evincing a reasonable belief of government wrongdoing is protected

under the WPA. 5 U.S.C. § 2302(b)(8)(A) (emphasis added). The deliberate use of the modifier “any” here strongly suggests Congress intended to protect a wide array of whistleblowing activity, regardless of when the disclosure occurred. “‘Any,’ after all, means any.” See Ford v. Mabus, 629 F.3d 198, 206 (D.C. Cir. 2010) (citing United States v. Gonzalez, 520 U.S. 1, 5 (1997) and explaining that “any” has “expansive meaning”).

A more restrictive interpretation of section 2302(b)(8)(A), particularly as it relates to the “subject matter” of a disclosure, would also conflict with section 2302(f) of the WPA, which was added by the WPEA to reverse a series of court-mandated limitations on protecting disclosures. Section 2302(f)(1)(F) states that “the amount of time which has passed since the occurrence of the events described in the disclosure” is not cause for exclusion from section 2302(b)(8). Thus, the only statutory provision arguably related to the content of a disclosure suggests broad protection and that no particular significance should be attached to the timing of the subject matter of the disclosure.

In sum, the WPA’s plain language protects an employee or applicant from whistleblower retaliation based on “any” disclosure he has made. And “any” disclosure would cover those made before the whistleblower applied to work for the federal government. To the extent any ambiguity exists on this point, OSC urges the Board to interpret the WPA liberally because it is a remedial statute. This broad interpretation embraces, rather than rejects, whistleblowers fairly within the scope of the WPA and better “effectuate[s] the purpose of the Act.” Fishbein, 102 M.S.P.R. at ¶ 8.

B. The WPA’s Statutory Purpose and Legislative History Underscore the Need to Protect Whistleblowers—Particularly Contract Employees—Who Make Disclosures Before Applying for Federal Employment.

1. A Narrow Reading of the Word “Applicant” in the WPA Would Contradict Congressional Intent and Lead to Absurd Results.

The WPA specifically covers applicants because Congress sought to ensure that whistleblowers outside the federal workforce would not be prevented by retaliation from entering it. Requiring a whistleblower to be an applicant not just when the retaliatory personnel action occurred, but also at the time of the disclosure, would frustrate this purpose by severely restricting the number of applicants covered under the Act. It would be anomalous for Congress to explicitly grant protection to applicants, but then limit that protection to the small subset of individuals who make their disclosures in the (typically) short period between their application for employment and the alleged retaliatory personnel action.⁵

Further, this constricted reading may have unintended consequences in other provisions for whistleblower protection. For instance, section 1221(a) could be read similarly to indicate that the Board has IRA jurisdiction over applicants only while their applications for federal employment are pending. In relevant part, only “an employee, former employee, or applicant for employment may... seek corrective action from the Merit Systems Protection Board.” 5 U.S.C. § 1221(a). Under the AJ’s reasoning, a whistleblower would lose standing once a selection is made. Congress could not have intended this absurd result.

Such a cramped reading would also contravene congressional efforts to encourage *timely* reporting of government wrongdoing. See S. Rep. No. 112-155, at 1 (“[I]n a post-9/11 world, we

⁵ Based on OPM’s “Hiring Process Analysis Tool,” this time period is often less than two months. See <https://www.opm.gov/policy-data-oversight/human-capital-management/hiring-reform/hiring-process-analysis-tool/create-and-post-a-job-opportunity-announcement-including-identifying-career-patterns/>. In the appellant’s case, it appears to have been less than one month.

must do our utmost to ensure that those with knowledge of problems at our nation’s airports, borders, law enforcement agencies, and nuclear facilities are able to reveal those problems without fear of retaliation or harassment.”). The narrow interpretation adopted by the AJ in this case creates a perverse incentive for non-federal whistleblowers who may have important disclosures: They must wait until a particular job is announced and their application is received before raising an alarm. In effect, it forces whistleblowers to choose between securing statutory protections for themselves and promptly making crucial disclosures that help protect the public. Congress surely could not have meant to allow—and the Board should not now create—such a Hobson’s choice.

2. Since the Passage of the WPA, Congress Has Consistently Discouraged Limitations on the Scope of Whistleblower Protections.

Congress has repeatedly disapproved of judicial attempts to place limits on the scope of whistleblower protections in the WPA. In a 1988 report on the WPA, it expressed frustration over actions and decisions that restricted whistleblowers’ ability to obtain corrective action, emphasizing:

The Committee intends that disclosures be encouraged. The OSC, the Board, and the courts *should not erect barriers to disclosures* which will limit the necessary flow of information from employees who have knowledge of government wrongdoing. For example, it is inappropriate for disclosures to be protected only if they are made for certain purposes or to certain employees or only if the employee is the first to raise the issue.

S. Rep. No. 413, at 13 (1988) (emphasis added). Twenty-four years later, Congress remained critical of the Federal Circuit’s and the Board’s propensity to read the WPA narrowly:

Despite the clear legislative history and the plain language of the 1994 amendments, the Federal Circuit and the MSPB have continued to undermine the WPA’s intended meaning by imposing limitations on the kinds of disclosures by whistleblowers that are protected under the WPA. S. 743 makes clear, once and for all, that Congress intends to protect “any disclosure” of certain types of

wrongdoing in order to encourage such disclosures. It is critical that employees know that the protection for disclosing wrongdoing is extremely broad and will not be narrowed retroactively by future MSPB or court opinions. Without that assurance, whistleblowers will hesitate to come forward.

S. Rep. No. 112-155, at 4-5 (2012).⁶ The report also bolsters the belief—embraced by the MSPB in Greenup, Weed, and Cahill—that the focus in whistleblower retaliation claims should be on employment status at the time of the personnel action, rather than the timing of the disclosure.

Specifically, the Committee noted that the Federal Circuit decisions overturned by the WPEA:

are contrary to congressional intent for the WPA. *The court wrongly focused on whether or not disclosures of wrongdoing were protected, instead of applying the very broad protection required by the plain language of the WPA.* The merits of these cases, instead, should have turned on the factual question of whether personnel action at issue in the case occurred “because of” the protected disclosure.

S. Rep. No. 112-155, at 5 (2012) (emphasis added). The message from Congress is clear: The WPA must be read to provide robust protection for whistleblowers.

Accordingly, the Board should broadly construe section 2302(b)(8) to prohibit retaliation against applicants for federal employment who have made disclosures, regardless of when the disclosures occurred.

3. Contract Employees Who Apply for Federal Jobs Are the Type of “Insider” the WPA Was Designed to Protect.

The protections in section 2302 of the WPA were first enacted in the Civil Service Reform Act of 1978 (CSRA). Those measures were designed to protect “insiders” who were in a unique position to witness government wrongdoing and who should not “suffer if they help uncover and correct administrative abuses.” S. Rep. 95–969, at 8 (1978). Of course, it is often difficult for applicants coming from outside the federal workforce to have significant insight into potential government wrongdoing. Nonetheless, by its plain terms, the statute protects applicants

⁶ Although the Senate Report uses the term “employee” throughout, this is likely for the sake of simplicity, rather than to restrict their statements to employees only. It is reasonable to assume that Congress was well aware of the existing protections for applicants, and thus that its criticism of Federal Circuit and Board interpretations extends to cases narrowing protections for applicants as well.

from whistleblower retaliation even if they do not have access to “insider” knowledge about the workings of a government agency.

Certainly then, where a contract employee—like the appellant—makes a disclosure, becomes an applicant, and then suffers retaliation, the statute should protect him. Contract employees applying for federal jobs comprise a substantial subset of applicants who truly are the type of individuals with inside government knowledge the WPA was designed to protect.⁷ Working alongside federal employees, often fully integrated into the agencies they serve, contract employees are ideally situated to observe and report the type of government wrongdoing outlined in section 2302(b)(8). In some instances, they may even be better able than federal employees to observe certain types of wrongdoing, such as contract or procurement fraud. In short, they are in the “unique position” to witness government misconduct that Congress envisioned when they enacted the CSRA. *Id.*

III. When Read in Conjunction With the National Defense Authorization Act of 1987 (NDAA), It Is Clear That the WPA Should Be Construed to Protect All Applicants from Whistleblower Retaliation.

To uphold the AJ’s decision in this case would create an odd gap in whistleblower protections. Under the WPA, federal employees and applicants are protected from retaliation by government agencies. Under the National Defense Authorization Act of 1987, as amended in 2013, contract employees are protected from retaliation by contractors. *See* 10 U.S.C. § 2409, 41 U.S.C. § 4712. But under the AJ’s narrow interpretation of the term “applicant,” contract employees applying for federal jobs would remain vulnerable to retaliation by the very agency

⁷ “[T]he Congressional Budget Office determined that federal agencies spent over \$500 billion for contracted products and services in 2012. Between 2000 and 2012, such spending grew more quickly than inflation and also grew as a percentage of total federal spending. The category of spending that grew the most in dollar terms was contracts for professional, administrative, and management services....” Congressional Budget Office, *Federal Contracts and the Contracted Workforce* (March 2015), p. 1. *See* <https://www.cbo.gov/publication/49931>.

they tried to improve through their disclosures—despite the specific coverage of “applicants” in the WPA.

This is especially problematic because government agencies are (rightly) encouraging contract employees to come forward and disclose wrongdoing, emphasizing that they are protected under the NDAA.⁸ At the same time, however, it seems highly unlikely that agencies or contractors are informing contract employees that, while they are indeed protected from discharge, demotion, and other personnel actions by their contractors, they are not protected from retaliation by agencies where they may be applying for federal jobs. It is fundamentally unfair to encourage disclosures, assure whistleblowers that they are protected, and then read the relevant statutes narrowly to exclude them.

IV. Nothing in the Uniformed Services Employment and Reemployment Rights Act (USERRA) Suggests That the WPA Should Be Read to Limit Coverage of Employees or Applicants.

In its January 2016 notice, the Board asked for a comparison between the “employee or applicant” language in the WPA and the broader “person” language in USERRA. The stated purpose for each statute, as well as their respective locations within the United States Code, offer some explanation for the difference. In cases arising under various federal anti-discrimination and retaliation statutes, the Supreme Court has advised that courts should take great care to look at the purpose, design, and structure of each statute as a whole. See Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 174-75 (2009); see also Univ. of Texas Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2527 (2013) (“[] Court was careful to restrict its analysis to the statute before it and withhold judgment on the proper resolution of a case, such as this, which arose under Title VII rather than the ADEA.”).

⁸ See, e.g., <https://oig.state.gov/HotlineVideo> (a Department of State OIG script informing contractors that “[n]ow employees of federal contractors, subcontractors, and grantees are protected against reprisal if they are demoted, discharged, or discriminated against as a result of reporting wrongdoing.”).

USERRA is located in Title 38, which addresses “Veterans Benefits.” Title 38 provides a wide variety of protections and benefits to veterans and uniformed service members, as well as their spouses, children, covered dependents, and other designated beneficiaries. As a result, those who may invoke protections and benefits under Title 38 are defined not by their employment status, but rather by their veteran or military status (or association with such an individual). Thus, it would be cumbersome and impractical to describe them by their employment status; an easier and broader term is “person.”

Moreover, the primary “person” who Congress intended to protect from discrimination and retaliation under USERRA is one “who is a member of, *applies to be a member of*, performs, has performed, *applies to perform*, or has an obligation to perform service in a *uniformed service*....” 38 U.S.C. § 4311(a) (emphasis added). Thus, statutory coverage would extend to, among others, individuals who have an application for membership or service in the military. Given the statutory scheme intended to protect service members, as well as those who apply to join or perform military service, it would be confusing to use the term “applicant” in the statute as a reference to either one’s employment or standing to “submit a complaint against a federal executive agency” under 38 U.S.C. § 4324(b). Again, the word “person” is appropriate given the purpose, design, and structure of that statute.

Unlike USERRA, the WPA is located in Title 5, which addresses “Government Organization and Employees.” It makes sense then, that the individuals who may invoke protections or benefits under Title 5 are described in terms of their relationship to the federal employment system—typically “employee or applicant.” Additionally, the group that Congress intended to protect with the WPA—federal employees, applicants for employment, and former employees—is appropriate and consistent with that Act’s statutory purpose, design, and structure.

While use of the term “person” may have been perfectly acceptable under the WPA, there should be no negative inference drawn from the terms actually selected by Congress in the WPA. See Fed. Express Corp. v. Holowecki, 552 U.S. 389, 393 (2008) (finding that when conducting statutory interpretation, one “must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination”). Following the guidance of the Supreme Court, the Board should confine its analysis in this case to the WPA and find that it protects whistleblowers who make disclosures before applying for federal employment.

CONCLUSION

Based on the foregoing, the Special Counsel urges the Board to remand this case for consideration on the merits.

Respectfully submitted,

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